INDEX

CITATIONS

In the Supreme Court of the United States

October Term, 1944

No. 613

Inland Empire District Council, Lumber and Sawmill Workers Union, et al., petitioners

v.

Harry A. Millis, individually and as Chairman and Member of the National Labor Relations Board, et al.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court of the United States for the District of Columbia (R. 16–17) is unreported. The opinion of the United States Court of Appeals for the District of Columbia (R. 27–28) is reported in 144 F. 2d 539. The supplemental decision and certification of representatives of the National Labor Relations Board is reported in 55 N. L. R. B. 255. Decisions of the

Board in earlier phases of this case are reported in 51 N. L. R. B. 288 and 52 N. L. R. B. 1377.

JURISDICTION

The judgment of the court below (R. 31) was entered on July 24, 1944. The petition for a writ of certiorari was filed on October 19, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether petitioners are entitled to invoke the jurisdiction of the District Court of the United States for the District of Columbia to set aside a certification of representatives made by the Board pursuant to Section 9 (c) of the Act upon allegations that the hearings conducted by the Board in its investigation did not constitute the hearings contemplated by Section 9 (c) of the Act.

A further question urged by petitioners, but which we believe is not here presented, is:

2. Whether petitioners may invoke the jurisdiction of the district court by stating facts to show that the hearings held were inadequate under the due process clause of the Constitution.

STATUTES INVOLVED

The pertinent provisions of the National Labor Relations Act (49 Stat. 449, 29 U. S. C. 151 *et*

seq.) are set forth in Appendix A of the petition for a writ of certiorari, pp. 36–40.

STATEMENT

On March 9, 1943, certain locals of International Woodworkers of America, affiliated with the Congress of Industrial Organizations, hereinafter called the C. I. O., filed petitions with the National Labor Relations Board for investigation and certification of collective bargaining representatives of the employees at each of three of the five logging and milling operations of Potlatch Forests, Inc., hereinafter called Potlatch (R. 3–4). A hearing was held on these petitions on May 14 and 15, 1943, in which both the C. I. O. and petitioners fully participated (R. 4). Petitioners resisted the establishment of three separate units upon the ground that all five of Potlatch's logging and milling operations constituted a single appropriate unit (51 N. L. R. B. 288, 290–291). The Board accepted this contention, specifically finding that bargaining by the employees in all five operations in a single unit would be appropriate (51 N. L. R. B., at 292–293), and, on July 13, 1943, issued its decision (51 N. L. R. B. 288) dismissing the C. I. O. petitions (R. 4).

On July 16, 1943, the C. I. O. filed with the Board a petition for investigation and certification of a collective bargaining representative for employees in a single unit, composed of the em-

ployees in all five of Potlatch's operations (R. 4). On September 14, 1943, the Board issued and served upon petitioners a notice to show cause why the Board should not reinstate the prior C. I. O. petitions, treat the C. I. O. petition of July 16, 1943, as an amendment to the prior petitions, and decide the case without holding a further hearing (R. 5). In response to said notice, petitioners filed their protest and objections in which they stated the conclusion that the Board's failure to hold a further hearing would prejudice them, but failed to show any basis for that conclusion (R. 5–6, 52 N. L. R. B., at 1381). Thereafter, on October 14, 1943, the Board issued its decision and direction of election (52 N. L. R. B. 1377) in which it, first, vacated its prior decision dismissing the C. I. O. petitions and reinstated those petitions, and, second, made the C. I. O. petition of July 16, 1943 a part of the record in the earlier proceedings and treated it as an amendment to the earlier petitions (R. 6). On November 9, 10, 11, and 12, 1943, the Board conducted an election among the employees in the single unit consisting of the five Potlatch operations. In this election, the C. I. O. received 1,118 votes and petitioner, Inland Empire District Council, received 953 votes (R. 9).

On January 11, 1944, petitioners filed with the Board their motion to reconsider and vacate the decision and direction of election, stay the certification, and grant an appropriate hearing (R. 9).

Pursuant thereto, the Board, on January 27, 1944, ordered that a hearing be held with respect to the issues raised by petitioners' motion, and deferred ruling upon petitioners' request that the Board's decision and direction of election and the election itself be vacated until after it had reconsidered the entire record, including the evidence to be adduced at the further hearing (R. 9). On February 18 and 19, 1944, the Board conducted a hearing on the issues raised by petitioners' motion and petitioners fully participated therein (R. 10). Following this hearing, the Board, on March 4, 1944, issued its supplemental decision and certification of representatives (55 N. L. R. B. 255) in which it certified the C. I. O. as the exclusive representative of the employees in a unit consisting of all five of Potlatch's logging and milling operations (R. 10). On March 8, 1944, the Board denied petitioners' motion for reconsideration of the certification (R. 10).

On March 21, 1944, petitioners filed their complaint in the District Court of the United States for the District of Columbia (R. 1-13), praying for the issuance of a mandatory injunction requiring the Board to set aside its certification of representatives dated March 4, 1944, and, in the alternative, for the entry of a declaratory judgment decreeing said certification invalid and void. The complaint alleged that the certification unlawfully deprived petitioners of valuable bargaining rights and that the hearings held in the course

of the proceedings leading up to the certification neither satisfied the due process clause of the Constitution nor the statutory requirement of a hearing found in Section 9 (c) of the National Labor Relations Act. On March 29, 1944, members of the Board, individually and in their official capacities, filed their motion to dismiss the complaint (R. 13–15), urging that the district court was without jurisdiction of the subject matter of the complaint, and alternatively, that the complaint on its face failed to state a cause of action entitling petitioners to the relief prayed for. The district court, on April 5, 1944, overruled the Board's motion to dismiss with leave to the Board to answer the complaint (R. 17).

The Board, pursuant to Section 17–101 of the District of Columbia Code, filed its petition in the court below for the allowance of a special appeal from the order of the district court of April 5, 1944, overruling the Board's motion to dismiss the complaint. On May 15, 1944, the court below entered an order allowing the special appeal (R. 25) and on July 24, 1944, upon consideration of the appeal, reversed the order of the district court and remanded the cause to that court with directions to dismiss the complaint (R. 31).

ARGUMENT

1. Petitioners contend that the two hearings held by the Board in the course of the investiga-

tion which resulted in the certification of the C. I. O. failed to satisfy the due process clause of the Constitution and hence urge that the case involves a constitutional question judicial review of which is required in this proceeding. The facts alleged in the complaint, however, clearly establish that the procedure followed by the Board satisfies due process requirements.

As noted in the Statement, petitioners were heard with respect to their contention that all five of Potlatch's logging and milling operations should constitute a single appropriate bargaining unit at the hearing on the C. I. O. petitions for investigation and certification of representatives at each of three of Potlatch's five logging and milling operations (51 N. L. R. B., at 290–293). Thereafter the Board issued and served upon petitioners a notice to show cause why it should not reinstate the original C. I. O. petitions, treat the new C. I. O. petition as an amendment thereto, and proceed to a new decision upon the basis of its reconsideration of the petitions as thus amended without holding a further hearing (R. 5). Petitioners, in response thereto, objected generally to the Board's proposed procedure but failed to allege any facts establishing that they would be prejudiced by the Board's proposal to conduct the election among the employees in all five of Pot-

latch's operations, the unit which petitioners had previously contended was the appropriate unit, without holding a further hearing (*id.*). The Board thereupon directed and held the election (R. 6, 9). Subsequently, petitioners filed with the Board a motion to vacate and to grant a hearing, this time alleging facts tending to establish prejudice to its rights resulting from the Board's failure to hold a further hearing before conducting the election (R. 7–9). Pursuant to petitioners' motion, the Board directed that a further hearing be held "to adduce evidence with respect to the issues raised by the last said motion and objections to the election" and agreed to reconsider the entire case (R. 9). The second hearing was held and petitioners fully participated therein (R. 10). Thereafter, upon reconsidering the entire case, including the evidence adduced at the second hearing, the Board handed down its supplemental decision and certification of representatives in which it affirmed its prior decision with respect to the scope of the unit appropriate for bargaining collectively with Potlatch and certified the C. I. O. as the exclusive representative of the employees in said unit (*id.*). On these facts there can be no question but that the Board's procedure fully satisfied constitutional requirements.

It is well settled that the due process clause of the Fifth Amendment guarantees no particular form of procedure, but is concerned solely with

the protection of substantial rights. *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333, 351. In giving petitioners an opportunity to show cause why the Board's proposed procedure should not be adopted, the Board was affording petitioners due process of law. The Board was not required to receive evidence in the absence of an offer by petitioners to show the respects in which they would be prejudiced by the action which the Board proposed to take. But assuming, *arguendo,* that the Board erred in failing to hold a further formal hearing prior to issuing its decision and direction of election, its failure in this regard does not present any constitutional question since the Board did subsequently hold a formal hearing prior to the issuance of its supplemental decision and certification of representatives at which petitioners were fully heard with respect to all issues which they desired to raise. This procedure fully satisfies the due process clause. The courts have repeatedly held not only that a hearing need not be held at any particular time, but that it may be held at any time before final judgment is entered (*Gallup* v. *Schmidt*, 183 U. S. 300, 307; *Wilson* v. *Standefer*, 184 U. S. 399, 415; *Wells, Fargo & Co.* v. *Nevada*, 2 . S. 165, 168; *United States* v. *Illinois Central R. Co.*, 291 U. S. 457, 463; *Nickey* v. *Mississippi*, 292 U. S. 393; *Opp Cotton Mills* v. *Administrator, Wage and Hour Division*, 312 U. S.

126, 152–153). Indeed, this Court has held that due process requirements are met even if no hearing is held before judgment is entered, if an opportunity to be heard is afforded on appeal (*York v. Texas*, 137 U. S. 15, 20–21; *American Surety Co.* v. *Baldwin*, 287 U. S. 156, 168; *George Moore Ice Cream Co.* v. *Rose*, 289 U. S. 373, 384).

2. Petitioners' further contention that the hearings held by the Board in the certification proceeding in question do not comply with the statutory requirement therefor and that hence the district court had jurisdiction to set aside the certification is without merit. It should first be noted that the provision in Section 9 (c) of the Act for an appropriate hearing in any investigation of a question concerning representation does not require that a hearing be held at any particular stage of the proceedings. Consequently, any hearing which satisfies the due process clause of the Constitution meets the statutory requirement. We have shown, under point one, that the two hearings held by the Board prior to the issuance of the certification in controversy fully satisfy constitutional requirements. The face of the complaint likewise reveals that the petitioners were afforded the hearing contemplated by the Act in the representation proceeding in question.

In any event, the district courts are powerless to intervene to set aside certifications of repre-

sentatives made pursuant to Section 9 (c) of the Act. In Section 9 of the Act, Congress vested in the Board the function of determining the unit appropriate for collective bargaining and of investigating and certifying the collective bargaining representatives selected in accordance with the Act (Sections 9 (b) and (c)). Congress, however, did not see fit to provide for judicial review of the Board's certifications of bargaining representatives except as prescribed in Section 9 (d) of the Act. That subsection provides for review of certification proceedings by the appropriate circuit court of appeals of the United States only after the Board enters a final order pursuant to Section 10 (c) of the Act, based in whole or in part upon facts certified following an investigation under Section 9 (c). When the Board enters such an order, any person aggrieved thereby may obtain a review under Section 10 (f) of the Act. The statute on its face thus discloses an intention on the part of Congress to prevent the review of certifications made pursuant to Section 9 (c) of the Act except where such certifications form the basis for a final order under Section 10 (c) of the Act, directing an employer to cease unfair labor practices. This Court has held, after carefully considering the legislative history of the Act, that it was the intention of Congress to deny to the circuit courts of appeals power to intervene in representation proceedings conducted by the

Board under Section 9 (c) of the Act, except in the limited manner provided in Section 9 (d). *American Federation of Labor* v. *National Labor Relations Board,* 308 U. S. 401; *National Labor Relations Board* v. *International Brotherhood of Electrical Workers,* 308 U. S. 413. As petitioners have noted (Br. 15), however, this Court found it unnecessary to reach the question with which we are here concerned: whether the district courts sitting in equity have the power to review such certifications of representatives.

The legislative history of the Act, it is submitted, compels the conclusion of the court below that Congress intended to leave the determination of the appropriate bargaining unit and the investigation and certification of the statutory bargaining representative of employees entirely to the Board and to exclude such determinations and certifications from judicial scrutiny except in the manner provided in the Act. Thus the Senate Committee Report on S. 1958, the bill which subsequently became the National Labor Relations Act (S. Rep. No. 573, 74th Cong., 1st Sess., p. 14) states that:

> Section 9 (d) makes it absolutely clear that there shall be no right to court review anterior to the holding of an election. An election is the mere determination of a preliminary fact, and in itself has no substantial effect upon the rights of either employers or employees. There is no more reason

> for court review prior to an election than for court review prior to a hearing. But if subsequently the Board makes an order predicated upon the election, such as an order to bargain collectively with elected representatives, then the entire election procedure becomes part of the record upon which the order of the Board is based, and is fully reviewable by any aggrieved party in the Federal courts in the manner provided in section 10. And this review would include within its scope the action of the Board in determining the appropriate unit for purposes of the election. This provides a complete guarantee against arbitrary action by the Board.

As this Court noted in the *American Federation of Labor* case, *supra*, (308 U. S., at 411), "the bill was similarly explained on the Senate floor by the committee chairman who declared: 'It provides for review in the courts only after the election has been held and the Board has ordered the employer to do something predicated upon the results of an election' (79 Cong. Rec., 7658)."

The House Committee (H. Rep. No. 1147, 74th Cong., 1st Sess., p. 23) said:

> Section 9 (d) of the bill makes clear that there is to be no court review prior to the holding of the election, and provides an exclusive, complete, and adequate remedy whenever an order of the Board made pursuant to section 10 (c) is based in whole or

in part upon facts certified following an election or other investigation pursuant to section 9 (c).

The reasons for withholding from the courts the power to review certifications of bargaining representatives made pursuant to Section 9 (c) of the Act, except as incidental to review by the circuit courts of appeals of an order restraining unfair labor practices under Section 10 (c) of the Act, are clearly stated in the Committee Reports which refer to the experience of the predecessor National Labor Relations Board under Public Resolution 44, (48 Stat. 1183), wherein Congress specifically provided for court review of orders for elections. Thus the Senate Report (S. Rep. No. 573, 74th Cong., 1st Sess., pp. 5–6) reads as follows:

> Under Public Resolution 44, any attempt by the Government to conduct an election of representatives may be contested *ab initio* in the courts, although such election is in reality merely a preliminary determination of fact. This means that the Government can be delayed indefinitely before it takes the first step toward industrial peace. After almost a year not a single case, in which a company has chosen to contest an election order of the Board, has reached decision in any circuit court of appeals.
>
> This break-down of the law is breeding the very evil which the law was designed to prevent.

The House Committee, after referring to the procedure for review under Public Resolution 44, similarly declared (H. Rep. No. 1147, 74th Cong., 1st Sess., p. 7):

> When an employee organization has built up its membership to a point where it is entitled to be recognized as the representative of the employees for collective bargaining, and the employer refuses to accord such recognition, the union, unless an election can promptly be held to determine the choice of representation, runs the risk of impairment of strength by attrition and delay while the case is dragging on through the courts, or else is forced to call a strike to achieve recognition by its own economic power. Such strikes have been called when election orders of the National Labor Relations Board have been held up by court review.

The conclusion that Congress intended in the Act to limit judicial review of actions of the Board in representation proceedings to that provided in Section 9 (d) of the Act is strongly reinforced by the decision of this Court in *Switchmen's Union of North America* v. *National Mediation Board*, 320 U. S. 297, under the Railway Labor Act. There is no provision in the Railway Labor Act for judicial review of certifications of representatives made pursuant to Section 2, Ninth, but that Act does provide for judicial review of two other types of administrative actions (Sec-

tions 3, First (p) and 9, Third (a)). This Court (320 U. S., at 301, 305), by reference to "the type of problem involved and the history of the statute in question", and the "highly selective manner in which Congress has provided for judicial review of administrative orders or determinations under the Act", concluded that Congress did not intend to allow judicial review of determinations of the National Mediation Board under Section 2, Ninth, of that Act. The Court accordingly reversed the decision of the Court of Appeals for the District of Columbia, expressly holding (320 U. S., at 300) that "the District Court did not have the power to review the action of the National Mediation Board in issuing the certificate." See also *General Committee of Adjustment* v. *Missouri-Kansas-Texas Railroad Co.*, 320 U. S. 323; *General Committee of Adjustment* v. *Southern Pacific Co.*, 320 U. S. 338; *Brotherhood of Railway & Steamship Clerks* v. *United Transport Service Employees*, 320 U. S. 715; *Order of Railway Conductors* v. *National Mediation Board*, 141 F. (2d) 366, 367 (App. D. C.), certiorari granted, No. 200, this Term, October 9, 1944; *United Transport Service Employees* v. *National Mediation Board*, 141 F. (2d) 724, 725 (App. D. C.); *National Federation of Railway Workers* v. *National Mediation Board*, 141 F. (2d) 725, 726 (App. D. C.); cf. *Employers Group of Motor Freight Carriers* v. *National War*

Labor Board, 143 F. (2d) 145 (App. D. C.), certiorari denied, October 9, 1944.

We submit that the factors which impelled this Court to hold in the *Switchmen's* case that Congress in the Railway Labor Act intended to vest in the National Mediation Board "the final say" (320 U. S., at 303) with respect to disputes concerning the representation of employees, without affording recourse to the courts, plainly require a similar conclusion under the National Labor Relations Act. The problem involved, that of determining the collective bargaining representative, is the same under both Acts, and it is as important under the National Labor Relations Act as it is under the Railway Labor Act that there "be no dragging out of the controversy into other tribunals of law" (320 U. S., at 305). The legislative history of the National Labor Relations Act, as we have shown, establishes even more clearly than does the legislative history of the Railway Labor Act, the intention of Congress to limit judicial review of representation proceedings under Section 9 (c) of the Act to that afforded in the circuit courts of appeals in connection with the review of orders in unfair labor practice proceedings based in whole or in part on certifications issued by the Board in prior representation proceedings. The court below, therefore, properly regarded the *Switchmen's* case as foreclosing the contention, here urged by petitioners, that the district courts

had jurisdiction to set aside certifications of representatives under Section 9 (c) of the Act. Its conclusion is no less correct when the petitioners' claim is that the hearings afforded did not meet the statutory standards, than it is, constitutional questions aside, when any other type of challenge to the certification order is made.

The wisdom of the congressional policy to deny the courts jurisdiction over certification proceedings except as provided in Section 9 (d) of the Act is more evident now than ever before, for, in this way, the industrial strife which Congress has found results from attempts to delay by court action the determination of bargaining representatives by the Board (S. Rep. No. 573, 74th Cong., 1st Sess., pp. 5-6; H. Rep. No. 1147, 74th Cong., 1st Sess., pp. 6-7) is avoided as far as is possible. During the fiscal year ending June 30, 1944, the Board held over 4,700 elections and pay roll checks in which almost 1,100,000 valid votes were cast.[1] In the previous fiscal year, the Board conducted about 4,150 elections and pay roll checks in which an even greater number of valid votes were cast.[2] In the fiscal years ending in

[1] Of this total number, 501 were pay roll checks. These figures are taken from tables prepared for inclusion in the Board's *Ninth Annual Report* which is not yet published.

[2] National Labor Relations Board, *Eighth Annual Report*, 1943, pp. 23, 24, 95. The Board's records show that 511 of this total were pay roll checks.

1942, 1941, and 1940, the Board held 4,212, 2,566, and 1,192 elections and pay roll checks.[3] It can thus be readily seen that if the determination of bargaining representatives by the Board is delayed by resort to the courts in only a small percentage of the election cases handled by the Board, industrial strife which Congress sought to avoid would result.

In view of the limitations upon court review of certification proceedings appearing on the face of the Act, the manifest intention of Congress that there be no other type of court review of such proceedings, and the clear authority of Congress to limit review to that provided in the Act, it is respectfully submitted that the court below properly concluded that the statutory review of certification proceedings is exclusive and that the district courts, accordingly, are without jurisdiction over such proceedings.

CONCLUSION

The decision of the court below is correct and there is no conflict of decisions. The case involves no constitutional question and no other question is presented which warrants review. The petition

[3] National Labor Relations Board, *Seventh Annual Report*, 1942, pp. 32, 34; *Sixth Annual Report*, 1941, p. 36; *Fifth Annual Report*, 1940, p. 18.

for a writ of certiorari should therefore be denied.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.

ALVIN J. ROCKWELL,
General Counsel,

RUTH WEYAND,
OWSLEY VOSE,
CHARLES F. MCERLEAN,
Attorneys,
National Labor Relations Board.

NOVEMBER 1944.

U. S. GOVERNMENT PRINTING OFFICE: 1944